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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES PAUL CROSS et al., Defendants and Appellants.	C059882 (Super. Ct. No. 04F08966)

A jury convicted defendants James Paul Cross and Ryan Patrick Hill of conspiracy to commit murder, distribution of an assault weapon, solicitation to commit murder, and receipt and sale of stolen property. The jury found true the allegations that defendants were armed with an assault weapon during the commission of the conspiracy offense and that such offense was committed for the benefit of a criminal street gang. The jury

also found true an allegation that the solicitation offense was committed for the benefit of a criminal street gang.

The trial court denied probation and sentenced defendant Hill to 25 years to life for the conspiracy conviction plus an additional three years for the firearm enhancement, a concurrent term of six years for the solicitation conviction plus a concurrent five years for the gang enhancement, and a concurrent term of two years for the receipt of stolen property conviction. The trial court sentenced defendant Cross to 25 years to life for the conspiracy conviction plus an additional three years for the firearm enhancement, a concurrent term of six years for the solicitation conviction plus a concurrent five years for the gang enhancement, and a concurrent term of two years for each of the two purchase of stolen property convictions. The trial court stayed a six year sentence as to each defendant for the weapon possession conviction.

Defendants argue there was: (1) insufficient evidence to support the conspiracy conviction because one of the conspirators was a government informant, (2) instructional error on the conspiracy count, (3) instructional error for failure to instruct that solicitation to commit murder was a lesser included offense to conspiracy to murder, (4) insufficient evidence to support the assault weapon arming enhancement, (5) insufficient evidence to establish a criminal street gang, (6) incorrect application of the gang enhancement to the solicitation count, (7) improper response to a jury question, and instructional error on the elements of entrapment.

We shall conclude that we must remand for resentencing on the gang enhancement to count three, solicitation of murder, but shall otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Stanley Smith has been working as a law enforcement informant on and off since 1990. He has served two prison terms since 1994--one for armed robbery and one for statutory rape. Smith met Placer County Sheriff's Detective Ken Addison in June 2004. Addison wanted Smith to infiltrate the Vagos, an outlaw motorcycle gang. The California Department of Justice defines an outlaw motorcycle gang as "an organization whose members utilize their motorcycle affiliation as a conduit for a criminal enterprise."

Addison and Smith decided that Smith would go to Fast Fridays in Auburn, California, where Vagos members were known to hang out. Fast Fridays is an event where flat track motorbike races are held. When Smith went to his first race, he looked for Vagos jackets, i.e., motorcycle jackets with the Vagos emblem on the back. Smith saw Cross standing at the fence near the end of the track with another man. Smith approached them and struck up a conversation. Smith told the men he had just gotten out of prison. Cross invited Smith to a bar. At the bar, Smith met defendant Hill, also known as "Boogie," as well

as Cross, and sometime later, he also met defendant Matteson, also known as "Pooh."[1]

Cross told Smith that the Vagos were recruiting. Cross and Smith discussed ways Smith could make some money. They talked about methamphetamine and stealing Harley Davidsons.

Later, Cross telephoned Smith and told him that he had a stolen 1986 Harley Davidson that he would like to sell, if Smith would be interested. Smith purchased the bike from Cross for $2,000. The money for the purchase came from Detective Addison. Smith took the bike directly to the CHP and told the officers about the transaction.

Sometime later, Cross told Smith he had a brand new Harley, and that he would sell it to Smith for $3,000. Both Cross and Hill were involved in the sale. Smith picked up the motorcycle at Hill's house. Smith paid Cross with funds from Detective Addison and the CHP. Cross gave the money to Hill, who placed it under some clothing in the corner of his garage. Cross told Smith that the bike was stolen.

In mid-September, 2004, Cross and Hill told Smith that they wanted to rob and take $300,000 from someone named Hakala, who was a marijuana dealer living in Auburn. Defendants did not know where Hakala lived, but knew where he was having his Hummer repaired, and told Smith to follow Hakala home from the shop one

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[1] The jury was unable to reach a verdict as to Matteson, and the trial court declared a mistrial. Thus, Matteson is not a party to this appeal.

day. Smith followed Hakala to his home, but at the direction of Detective Addison, told Hill that he lost Hakala's vehicle.

In late September, Smith had a recorded conversation with Hill, during which Hill told Smith that the FBI had informed Hakala of a plot to kill him, and that there was another job that would be "easier and better." Hill told Smith that Cross wanted Smith to go to Cross's house because it was "nothing we can talk about even remotely on the phone."

Smith went to Cross's house. Cross took Smith to his back yard and patted him down. Smith had the recording device in a side pocket, which Cross missed during the search. Cross then told Smith he had somebody for him to "smoke" and that it would pay him "30 G's." The person he wanted killed was Jason Jordan, also known as Wood. During the meeting, Cross told Smith he would give him a machine gun "[o]n top of the 30 G's[.]"

Later, Smith and Hill went to scout out Jordan's residence. Hill gave Smith directions to the apartment building. Hill handed Smith a map to Jordan's home with the address written on it. They also discussed the assault rifle that had been promised to Smith. Smith said he wanted the assault rifle up front. Hill told Smith he would "get on that."

Hill advised Smith in a later telephone conversation that he had acquired the assault rifle. A day or two later, Smith, wearing a wire, went to Hill's house, where Hill gave him the assault rifle.

After the transaction with the assault rifle, Smith was supposed to have a final meeting with defendants at a restaurant

to discuss what they were going to do to Jordan. Smith picked up Hill and Hill's young son, and drove them to the restaurant. They all discussed the details of their plan to kill Jordan, and made plans to meet again on Friday morning (October 15, 2004) to begin executing their plans.

Smith and Cross left together to go to Cross's house to pick up the guns Smith would use on Jordan. Cross gave Smith two handguns and some ammunition, which Smith turned over to law enforcement.

On Thursday, October 14, 2004, before the murder plot could be executed, simultaneous search warrants were served on Hill, Cross, and Matteson.

Both Cross and Hill testified at trial. Cross testified that he was suspicious of Smith from the beginning. He proposed to sell the two stolen motorcycles to Smith as a test, in order to check him out. He knew that Smith was a snitch when he got an angry telephone call from the owner of the bar from which the second motorcycle had been stolen. He nevertheless continued to associate with Smith in order to "feed him a bunch of malarkey so I could really get him tripping on himself." He never asked Smith to harm Hakala, but only to help him locate Hakala's Hummer so that he could steal it. When he found out the FBI had tipped off Hakala to a plot on his life, he knew "[w]ithout a shadow of a doubt, [Smith was] dirty, dirty, dirty, and he's bad news."

Cross testified that when he had frisked Smith at Cross's home, he felt and saw the recording device, and believed it to

be a listening device or panic button that would bring law enforcement if Smith needed assistance. Cross nevertheless told Smith about the plan to kill Jordan, just to see what would happen with the information and to trip up law enforcement as much as possible. He picked Jordan because Jordan was one of his very best friends. He did not tell Jordan of the plan, however.

Cross admitted that it was "stupid" to give the guns and ammunition to Smith, but he did it to get "leverage" over Smith. He had the meeting at the restaurant because he wanted to "play this to the bone." He told Hill that the purpose of the meeting was "to feed this guy [Smith] such a big turd he is going to choke on himself."

Hill's testimony generally agreed with Cross's that there was never any intent to harm either Hakala or Jordan. Hill said that he just wanted to leave Smith alone and walk away from him, but Cross wanted to "mess with him[.]"

DISCUSSION

I

There was Sufficient Evidence of a Conspiracy

Defendants argue there was insufficient evidence of a conspiracy because the government informant was the one to perform the essential act of killing Jordan.[2] We disagree.

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[2] Each defendant has joined in the arguments of the other.

The elements of a conspiracy are: "(1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) In this case, the People presented both the testimony of Smith and recorded conversations showing the agreement between the defendants to kill Jordan, from which the jury could infer their specific intent to commit that offense. Evidence that Hill gave Smith a map to Jordan's home and a down payment of an assault rifle, and evidence that Cross provided Smith with the guns to be used to commit the murder constitute the requisite overt acts committed by both defendants.

Defendants nevertheless argue, citing *People v. Towery* (1985) 174 Cal.App.3d 1114 and *King v. State* (Fla. 1957) 104 So.2d 730, that where one of the participants in the conspiracy is a government informant, and the participants intend that an essential ingredient of the substantive offense is to be committed by, and only by, the informant, a conspiracy conviction against the other conspirators cannot stand.

We agree with the reasoning of *People v. Liu, supra*, 46 Cal.App.4th 1119, which held that this rule does not apply to conspiracies of more than two persons. The court analyzed the authorities cited by defendants and found them not controlling.

"None of these cases is controlling here. The rationale of *King v. State, Woo Wai,* and the other cases has been criticized and rejected in the more recent decisions considering this issue. Thus, at least six federal Circuit Courts of Appeals have explicitly or implicitly repudiated the rule of *King v. State. (U.S. v. Miranda-Ortiz* (2d Cir.1991) 926 F.2d 172, 175; *U.S. v. Palella* (5th Cir.1988) 846 F.2d 977, 980; *U.S. v. Giry* (1st Cir.1987) 818 F.2d 120, 126; *United States v. Freeman* (10th Cir.1980) 634 F.2d 1267, 1270; *United States v. Rose* (7th Cir.1978) 590 F.2d 232, 233-236; *United States v. Rueter* (9th Cir.1976) 536 F.2d 296, 298; *United States v. Seelig* (5th Cir.1974) 498 F.2d 109, 112.) Instead, these federal cases affirm the principle that conspiracy is based on an agreement to commit a crime and not the ultimate success of the crime planned. In accordance with this principle, all of these cases adopt the rule that when at least two coconspirators agree to violate the law and then perform an overt act in furtherance of that agreement, a criminal conspiracy has been formed and criminal liability attaches whether or not the substantive crime was ever accomplished, ever could be accomplished, or the person supposed to carry out the crime was actually an agent of the government. (*U.S. v. Miranda-Ortiz, supra,* 926 F.2d at p. 175; *U.S. v. Giry, supra,* 818 F.2d at p. 126; *United States v. Rose, supra,* 590 F.2d at pp. 234-236; *United States v. Rueter, supra,* 536 F.2d at p. 298.)

The one California case considering this issue, *People v. Towery, supra,* 174 Cal.App.3d 1114, is not controlling. Although the opinion in *Towery* discussed the holding of *King v. State,* the Court of Appeal did not expressly approve of it or adopt it as California law, and specifically declined to follow it under the factual circumstances before it. *Towery* dealt with the issue of the prima facie showing of

> conspiracy necessary to admit out-of-court statements over a hearsay objection. The decision simply did not address the question whether a defendant can be convicted of conspiracy if a coconspirator does not have the intent to commit the substantive crime. Its discussion of *King v. State* is therefore obiter dicta unnecessary to the decision in the case. (*People v. Towery, supra,* 174 Cal.App.3d at pp. 1130-1132.)" (*People v. Liu, supra*, at pp. 1129-1130, fn. omitted.)

Thus, the court held that the "feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agree to the commission of the subject crime, specifically intend that the crime be committed, and themselves commit at least one overt act for the purpose of accomplishing the object of the conspiracy." (*People v. Liu, supra,* 46 Cal.App.4th at at p. 1131.) As previously stated, there was sufficient evidence of these elements in this case.

For the reasons expressed herein, we likewise conclude the trial court did not err in failing to instruct that there could be no conspiracy if an essential ingredient of the target offense was to be committed by and only by a government agent.

II

Defendants were not Entitled to a Lesser Included Offense Instruction

Defendants argue the trial court should have instructed on solicitation to commit murder as a lesser included offense to conspiracy to commit murder. The trial court is required to

instruct on a lesser included offense if substantial evidence exists indicating that the defendants are guilty only of the lesser offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) However, the trial court need not instruct on a lesser included offense if the evidence is such that defendants, if guilty at all, were guilty of something beyond the lesser offense. (*People v. Morrison* (1964) 228 Cal.App.2d 707, 713.)

The elements of solicitation are an offer or invitation to another to commit a crime and the intent that the crime be committed. (*People v. Wilson* (2005) 36 Cal.4th 309, 328.) The crime of solicitation is complete as soon as the verbal request is made with the requisite intent, and is punishable regardless of the agreement of the person solicited or any overt act. (*Ibid*.) Thus, intent that the crime of murder be committed is common to both solicitation of murder and conspiracy to murder.

In addition to this intent, the crime of conspiracy requires an agreement and some overt act in furtherance of the agreement. Both of these elements were present in this case. Defendants recognized this in their closing arguments. Hill's attorney pointed to the elements of a conspiracy and said, "I'll sit here and tell you right now most of those things have been proven beyond any shadow of a doubt, but in order to prove that there was a conspiracy to commit murder, there has to be proven an intent to actually kill somebody." Because the agreement and overt act elements of conspiracy were proven, defendants were guilty, if at all, of conspiracy to murder rather than solicitation of murder.

Defendants argue that if the jury found that Smith alone was to be responsible for the essential act of killing Jordan, it could not have found them guilty of a conspiracy, and would have been required to acquit defendants of conspiracy, but convict them of solicitation to commit murder. This is based on the same faulty reasoning we rejected in section I, *ante*. We need not address it again.

III

Sufficient Evidence for Arming Enhancement

Both defendants were sentenced to an additional three year sentence for being armed with an assault weapon during the commission of the conspiracy, pursuant to Penal Code section 12022, subd. (a)(2).[3] Defendants argue there was insufficient evidence to support the sentence enhancement because there was no connection between defendants' possession of the weapon and the underlying killing of Jordan. However, the requisite connection is between the weapon and the conspiracy, not the weapon and the murder. Since the weapon was intended as partial payment for the murder, its connection to the conspiracy was sufficient to support the enhancement.

As defendants recognize, "for a defendant to be 'armed' for purposes of section 12022's additional penalties, the defendant need only have a weapon available for use to further the commission of the underlying felony." (*People v. Bland* (1995)

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[3] Further references to an unnamed section are to the Penal Code.

10 Cal.4th 991, 999.) Where the underlying felony is a continuing offense, the enhancement will apply if the defendant has a weapon available at any time during the felony to aid its commission. (*Ibid.*)

Conspiracy, requiring both an agreement and an overt act in furtherance of the agreement, is "the classic example of a continuing offense because by its nature it lasts until the final overt act is complete." (*People v. Becker* (2000) 83 Cal.App.4th 294, 297-298.) Thus where, as here, the underlying felony is conspiracy, "the period during which the arming enhancement may attach to such an offense is very broad: So long as the defendant has a weapon available for use at any point during the course of a continuing offense, his sentence may be enhanced for being armed." (*Id.* at p. 298.)

As defendants argue, there is no arming in the commission of a felony unless there is a nexus or link between the firearm and the underlying felony. (*People v. Bland, supra*, 10 Cal.4th at p. 1002.) The presence of the weapon "'cannot be the result of [an] accident or coincidence.'" (*Ibid.*, italics omitted, quoting *Smith v. United States* (1993) 508 U.S. 223, 238 [124 L.Ed.2d 138, 153, 154].)

Defendants incorrectly assume the underlying felony for purposes of the enhancement is the murder (or planned murder) of Jordan. It is not. The underlying felony to which the enhancement attaches is the conspiracy. (See *People v. Becker, supra*, 83 Cal.App.4th at p. 297 [stating that conspiracy is the underlying felony].) One of the elements of a conspiracy is an

overt act in furtherance of the agreement. In this case, one of the overt acts was the transfer to Smith of the assault weapon as partial payment for his agreement to murder Jordan. The presence and possession of the assault weapon was, therefore, not an accident or coincidence, but was an integral part of the conspiracy.

IV

Gang Enhancement

Section 186.22, subdivision (b) provides for an enhanced sentence if the felony conviction is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." Subdivision (f) requires that a criminal street gang have as one of its "primary activities" the commission of one or more enumerated criminal acts. Defendants contend there was insufficient evidence the Vagos gang had as one of its primary activities the commission of one of the acts enumerated in the statute.

One of the enumerated acts sufficient to describe a criminal street gang is "[t]he sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code." (§ 186.22, subd. (e)(4).) The evidence regarding this element came from the expert testimony of Michael Hudson, a special

agent supervisor for the California Department of Justice, Bureau of Narcotic Enforcement.

Hudson testified that the Department of Justice began a gang suppression unit in 2004, and that he had been its supervisor since its inception until seven months prior to trial. He initiated an investigation into the Sacramento area Vagos in 2004. The investigation lasted approximately six months, and included three months of wiretapping a member of the gang. The department initiated the investigation because they received information that one of the Vagos members was distributing large amounts of methamphetamine and using other members and associates to distribute the drug throughout the area. Hudson stated that the vast majority of his knowledge of the Vagos came from his six month investigation of them, and specifically his three months of wiretapping them. He also interviewed a Vagos member.

Hudson testified that one of the primary activities of the Vagos was the trafficking of illegal drugs, specifically methamphetamine. In addition Vagos were involved in firearms violations, stolen vehicles, and witness intimidation. Hudson testified regarding his knowledge of two Sacramento area Vagos members who had committed the crimes of transportation and sale of methamphetamine.

Expert testimony may provide the basis for a finding that a criminal street gang's primary activities consist of at least one of the criminal activities specified by statute. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.) Here,

the prosecution's expert testified that one of the primary activities of the Vagos was the trafficking of illegal drugs, specifically methamphetamine. This opinion was based on the expert's extensive investigation into the gang. Thus, the expert opinion was not, as defendants claim, "unexplained." The expert's opinion, based upon his investigations, was sufficient to support a jury finding that one of the Vagos's primary activities was the sale, possession for sale, transportation, or offer for sale of methamphetamine.

Defendants argue Hudson's claim that the Vagos engaged in firearms violations, stolen vehicles, and witness intimidation was not sufficiently specific to constitute the requisite criminal acts as enumerated in the statute. This is of no importance. A criminal street gang is defined as an organization "having as *one* of its primary activities the commission of *one* or more of the criminal acts enumerated" by statute. (§ 186.22, subd (f), italics added.) The gang's involvement in methamphetamine trafficking was sufficient in and of itself to qualify the group as a criminal street gang.

Defendants argue none of the charged offenses involved methamphetamine trafficking. However, it is not necessary under the terms of section 186.22, subdivision (b) that the defendants be convicted of committing one of the crimes which constitute the gang's primary activities. All that is necessary is the conviction of *any* felony for the benefit of, at the direction of, or in association with the gang with the specific intent to

promote, further, or assist in *any* criminal conduct by gang members.

However, defendants are correct that the trial court incorrectly imposed an additional five year sentence for the section 186.22 enhancement to count three, solicitation of murder. A five year enhancement is for the commission of a "serious felony, as defined in subdivision (c) of Section 1192.7[.]" (§ 186.22, subd. (b)(1)(B).) Solicitation of murder is not a serious crime under this section, therefore the proper enhancement was a term of two, three, or four years pursuant to section 186.22, subdivision (b)(1)(A).[4] We shall remand to allow the trial court to select one of the terms provided in subdivision (b)(1)(A).

V

Supplemental Probation Report

Defendants request a supplemental probation report be prepared upon remand for resentencing. The People have no objection. The probation reports were prepared over a year ago. In *People v. Dobbins* (2005) 127 Cal.App.4th 176, 181, this court held it was error for the trial court to fail to order a supplemental probation report after an eight month period. Thus, although no different circumstances will appear as a

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[4] Although section 1192.7, subdivision (c)(28) defines as serious any felony committed for the benefit of a criminal street gang, "it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B)." (*People v. Briceno* (2004) 34 Cal.4th 451, 465.)

result of this opinion, we will order a supplemental probation report on remand for resentencing.

VI

The Court Adequately Responded to Jury Requests

The jury began deliberations on Thursday morning, June 19. On Friday morning, June 20, the jury sent the following note (request number four) to the court at 10:55 a.m.:

> "We the jury in the above entitled cause request the following: 'Assistance in the deliberation process. We would like to see the Judge to discuss concerns regarding the deliberation process. Some jurors feel the process is getting personal and that biases are entering into decision-making'[.]"

A few minutes later, the jury requested a read-back of certain testimony.

After meeting with counsel in chambers, the trial court sent the following response to the jury:

> "The court reporter will read the portions of testimony you have requested. The jury may leave at 2:30 p.m. today and return on Monday, June 23 at 9:00 a.m. to resume deliberations. On Monday, if you desire further guidance or clarification regarding issues raised in request #4, please inform the court."

The court reconvened at 9:00 a.m. Monday morning, and at 11:20 Monday morning, the jury sent the following:

> "We the jury in the above entitled cause request the following: 'Assistance in the deliberation process. We would like to revisit request #4 as outlined on Friday . . . ."

Again, the trial court met and conferred in chambers with counsel, and the following response was sent to the jury:

> "The court may not specifically 'assist' a jury with its deliberative process. The jury should refer to the jury instructions which discuss the conduct of the jury generally such as CALCRIM 200 which says in part, the following: 'You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial. Do not let bias, sympathy, prejudice or public opinion influence your decision. You must reach your verdict without any consideration of punishment. You must follow the law as I explain it to you, even if you disagree with it.'
>
> Also please refer to CALCRIM 3550 which says in part, the following: 'It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do no[t] hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you. Keep an open mind and openly exchange your thoughts and ideas about this case. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.'
>
> If the jury has questions about any specific areas of the law or specific instructions, please inform the court."

This response was sent at 2:00 p.m. on Monday afternoon, and the jury returned with a verdict at 11:30 a.m. the next morning.

Defendants argue the trial court erred by refusing to investigate the jury's concern over biases entering into decision-making. They claim this failure resulted in a denial of their rights under the Sixth and Fourteenth Amendments. We disagree.

We conclude defendants forfeited this argument by tacitly consenting to the trial court's response to the jury. In any event, the response was proper.

"[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citation.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198.) Where a defendant fails to object to the trial court's proposed response to a jury note, he has given tacit approval to the trial court's response, and objection to the response is not preserved for appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 430.) In this case the trial court met with counsel before responding to the jury requests. Defendants asserted no objections to the responses, and thus have forfeited their objections.

In any event, the trial court's response was proper. The decision whether to investigate juror bias or misconduct rests within the sound discretion of the trial court. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) While the trial court is obligated to conduct a hearing into juror bias where good cause exists to doubt a juror's ability to perform his or her duties, the trial

court may not remove a juror unless the juror's inability to perform is shown as a "demonstrable reality[.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 821.) There must be some overt event or circumstance suggesting a likelihood that one or more members of the jury were influenced by improper bias. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

The jury notes at issue here appear to be nothing more than a request by the jury that the trial judge referee deliberations that may have become heated. This clearly would have been improper. There is no specific evidence of bias or taint as to any particular juror or jurors. What some jurors perceived as bias may have been no more than other jurors drawing on their own background when analyzing the evidence. This would not have been improper. "'[I]t is virtually impossible to divorce completely one's background from one's analysis of the evidence'" during jury deliberations. (*People v. Wilson, supra,* 44 Cal.4th at p. 830.) Using one's background in analyzing the evidence is appropriate and inevitable. (*Ibid.*)

The trial court responded to the first note by allowing the jurors to recess for the weekend, no doubt hoping cooler heads would prevail on Monday morning. When the second note was sent, the trial court appropriately told the jury it could not assist with deliberations, and reminded the jury of their duties as individual jurors. This apparently corrected the problem, as no specific report of individual bias was thereafter made, and the jury was able to reach a verdict the next morning. The trial court responded appropriately.

VII

Entrapment Instruction was Proper

The trial court gave an instruction on the defense of entrapment.[5] The instruction was a modified version of CALCRIM No. 3408, and the pertinent parts of the instructions were:

> "A person is entrapped if a law enforcement officer or his agent engaged in conduct that would cause a normally law-abiding person to commit the crime.
>
> Some examples of entrapment might include conduct like badgering, persuasion by flattery or coaxing, repeated and insistent requests, or an appeal to friendship or sympathy.
>
> Another example of entrapment would be conduct that would make commission of the crime unusually attractive to a normally law-abiding person. Such conduct might include a guarantee that the act is not illegal or that the offense would go undetected, an offer of extraordinary benefit, or other similar conduct.
>
> If an officer or his agent simply gave the defendant an opportunity to commit the crime or merely tried to gain the defendant's confidence through reasonable and restrained steps, that conduct is not entrapment.
>
> *The use of a confidential informant to expose illicit activity does not, by itself, constitute entrapment, so long as no pressure or overbearing conduct is employed by the informant.*

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[5] No reporter's transcript of the jury instructions appears in the record. We quote the written instruction from the clerk's transcript.

> In evaluating this defense, you should focus primarily on the conduct of the officer. However, in deciding whether the officer's conduct was likely to cause a normally law-abiding person to commit this crime, also consider other relevant circumstances, including events that happened before the crime, the defendant's responses to the officer's urging, the seriousness of the crime, and how difficult it would have been for law enforcement officers to discover that the crime had been committed.
>
> When deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation. Do not consider the defendant's particular intentions or character, or whether the defendant had a predisposition to commit the crime.
>
> As used here, an agent is a person who does something at the request, suggestion, or direction of an officer. It is not necessary that the agent know the officer's true identity, or that the agent realize that he or she is actually acting as an agent."

The italicized paragraph represents the trial court's addition to the standard jury instruction. Defendants argue that by adding the italicized language, the trial court conveyed that the only means of entrapment by an informant were "pressure or overbearing conduct." They argue this improperly increased their burden to prove the defense of entrapment.

"Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson*

(1956) 46 Cal.2d 818 [299 P.2d 243]." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

The trial court informed the parties it had included the paragraph regarding confidential informants as a variation on the use note for the standard instruction, and asked defendant Cross's counsel if he had any objection to the inclusion of the paragraph. Cross's counsel replied: "I do not, your Honor. I reviewed it after the Court informed me of it. I went back and looked at the use note, actually looked it up, and no, I think it is on point. It is accurate for our case and it should be included." The trial court asked if any other counsel wished to make a comment. Hill's counsel replied, "No." Defendants have thus forfeited any objection on appeal.

Because defendants also claim their counsels' failure to object resulted in ineffective assistance of counsel, we consider the merits of their contention on appeal. We find no error in the court's instruction.

In *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 568, the court stated, "[a]s a general rule, the use of decoys to expose illicit activity does not constitute entrapment, so long as no pressure or overbearing conduct is employed by the decoy." Thus, the trial court's addition to the instruction was a correct statement of the law.

Furthermore, we conclude no reasonable juror would have understood the instruction to limit the conduct constituting entrapment when a confidential informant, rather than a law enforcement officer is involved. The instruction told the jury

that entrapment could be instigated by a law enforcement officer "or his agent[.]" A confidential informant is, pursuant to the definition given in the instruction, an agent of law enforcement. The instruction gave examples of conduct constituting entrapment, including badgering, persuasion by flattery or coaxing, repeated and insistent request, appeals to friendship or sympathy, and conduct that would make commission of the crime unusually attractive to a normally law-abiding person. Taken as a whole, no reasonable juror could have understood the instruction to mean that conduct which would otherwise constitute entrapment if performed by an agent of law enforcement, would not constitute entrapment if performed by a confidential informant.

DISPOSITION

The sentence for the section 186.22, subdivision (b) enhancement to count three is vacated. The trial court is directed to order an updated probation report, and to impose a term of two, three, or four years for the section 186.22, subdivision (b)(1)(A) enhancement to count three. In all other respects the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

BUTZ, J.